SUPREME COURT, U. S.

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In the

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1968

No. [redacted] 102

JOHN WILLIAM SHAPARD,
Petitioner,

VERSUS

THE STATE OF OKLAHOMA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF CRIMINAL APPEALS OF THE STATE OF OKLAHOMA

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May, 1968

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THE STATE OF OKLAHOMA,
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Petitioner prays that a Writ of Certiorari be issued to review the judgment of the Court of Criminal Appeals of Oklahoma entered in the above cause on November 20, 1967. Petitions for Rehearings being denied on March 4, and 15, 1968. Judgment is final.

OPINION BELOW

The opinion of the Court of Criminal Appeals is reported in 437 P.2d 565 and is attached hereto as Appendix "A."

JURISDICTION

The judgment of the Court of Criminal Appeals of Oklahoma was entered November 20, 1967. A Petition for Rehearing and Motion for New Trial on Newly Discovered

Evidence, timely filed, was denied on March 4, 1968. A Second Petition for Rehearing and Motion for New Trial on Newly Discovered Evidence, timely filed, was denied on March 15, 1968. The jurisdiction of this Court is invoked under 28 U.S.C. 1257(3) and Rule (19) of the Supreme Court of the United States.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fourteenth Amendment to the Constitution of the United States in pertinent part:

Section One. Due Process of Law. * * *

"Nor shall any state deprive any person of life, liberty or property without due process of law . . ."

Title 22 Oklahoma Statutes, Sec. 259:

"When the examination of the witnesses on the part of the State is closed, any witness the Defendant may produce must be sworn and examined."

The Oklahoma Constitution, Article 2, Section 17 states:

"No person shall be prosecuted for a felony by information without having had a Preliminary examination before an Examining Magistrate, or having waived such Preliminary examination."

QUESTIONS PRESENTED

Whether Petitioner's rights under the United States Constitution particularly the Fourteenth Amendment Due Process clause thereto, were violated:

I.

By the trial court's failure to grant Petitioner a continuance, or Change of Venue where the facts showed the Petitioner could not reasonably receive a fair and impartial trial in Canadian County, Oklahoma after five months of unabated massive, pervasive, and prejudicial publicity which had labeled the case, "the hottest thing since the bombing of Pearl Harbor," and stated that because of the crime "Oklahoma City is beginning to know how Dallas felt on the day President Kennedy was assassinated," and admitted as early as one week after charges were filed "there is a serious question whether with the flood of details in the paper a fair trial can now be assured the accused anywhere in Oklahoma."

II.

By the trial court's refusal to grant Petitioner's Motion for Continuance at the close of empaneling the jury where the facts showed that a fair and impartial jury was not empaneled, because three jurors had prior to trial expressed or harbored a fixed opinion as to Defendant's guilt and by the court's failure to grant Petitioner's timely challenge to a juror who stated the (Petitioner) would have to put on evidence in order to establish his innocence, and who testified later he would like to "kill" the Petitioner, and ten jurors stated they had been exposed to prejudicial pre-trial reports.

III.

By reason of the fact that the Prosecuting Authorities issued a multitude of false and prejudicial public statements concerning co-defendants' prior criminal records,

commented on the character and reputation of the Petitioner, disclosed in detail prior to trial a co-defendant's confession stating it "corroborated the victim's story in detail," commented on the credibility of the State's witnesses calling them "Christians" and "Heroes" while labeling the Petitioner's witnesses as "criminals," and untruthfully related to the public that "the medical reports confirm the girl was raped" (this report was never introduced into evidence, yet several jurors stated they had read the prosecutor's statement concerning the report), prior to trial publicity indicated that Petitioner and co-defendants would plead guilty, accused the Petitioner of "buying" testimony, publicly implied Petitioner and co-defendants illegally "bugged" his office trying to gain information, and illegally "intimidated" the State's witnesses, and threatened him and his wife's life, and further intimidated Petitioner's witnesses by incarcerating them and threatening them with the fact they would "burn" if they testified to certain facts; and filed "secret" charges on the Petitioner "just to add to the case" and so he could be "mugged and fingerprinted."

IV.

By the refusal of the Examining Magistrate to allow the Petitioner at his Preliminary Hearing to call material witnesses on his own behalf that he had subpoenaed and who were present in court, when 22 Oklahoma Statutes, Section 259 states: ". . . any witness the Defendant may produce must be sworn and examined." This being a critical stage of the criminal proceedings under Oklahoma Law.

MANNER IN WHICH FEDERAL QUESTIONS WERE RAISED

The federal questions were raised in the following manner:

(1) Affidavit, Application and Notice of Change of Venue (R. 1105 through 1179) in paragraph (6) (R. 1103).

(2) Motion for Continuance (R. 1180 through 1234) which included all items set out in the Motion for Change of Venue.

(3) Motion for New Trial filed in Canadian County (R. 1360).

(4) Appeal to the Court of Criminal Appeals on Petition in Error. Same sets out error in overruling Motion for Change of Venue, paragraph 48 (R. 6) and paragraph 80 (R. 27); see also paragraph 113 (R. 37), and in overruling Motion for New Trial (R. 1360).

(5) The Brief of Appellant in the Court of Criminal Appeals (R. 39). Proposition I (R. 39), pages 7-31; Proposition II (R. 39), pages 61-95; Proposition III (R. 39), pages 61 and 95; and Proposition I (R. 39), page 101.

(6) Each point raised was overruled by the Appellate Court. The last paragraph of its opinion reads as follows:

> "After considering the voluminous record in this case, consisting of the case-made of five volumes, all the transcripts of separate hearing, numerous pleadings filed, the exhibits and briefs filed by both sides, we must conclude that this defendant received a fair trial with due process" (R. 42).

STATEMENT OF THE CASE

On July 8, 1965, Petitioner, age 16, was charged jointly with six other youths with the crime of Rape in the Second Degree.

Beginning the day charges were filed the newspapers, radio, and TV stations carried highly prejudicial reports which almost wholly originated from the prosecuting authorities (see Appendix B) more particularly the County Attorney who has stated he is not bound by Canon 20 of the Canons of Legal Ethics (R. 683). These reports continued unabated up to the day of the trial, gathering front page coverage and replacing the Viet Nam War news as top priority releases (see Appendix A). The case was labeled as "the hottest news story since the bombing of Pearl Harbor" and that it "replaced the weather as the subject of conversation . . . people stop you on the street and tell you their opinion of the incident," and that as early as one week after the charges were filed stated "there is a serious question whether, with the flood of details in the paper, a fair trial can now be assured the seven accused anywhere in Oklahoma" (R. 1128).

Local television editorials and newspapers related that because of the alleged crime, "Oklahoma City is beginning to know how Dallas felt on the day President Kennedy was assassinated" (R. 1128).

The publicity established within the community such an air of hysteria and clamor for conviction that one paper reported the case "has set off the greatest deluge of letters to the editors that this paper has known, many of which are of a nature that are not only highly inflammatory and

obscene, but which does not make them fit for inclusion" (R. 546).

Even prior to the Preliminary Hearing held in September 7th through the 9th, 1965, clubs of women were formed to "see that thes unprincipled and impious criminals who abandoned the laws of God, man's decency and the laws of the United States are prosecuted without hope of probation or parole."

Because of the national publicity letters were received by the family of the Petitioner as far away as Chicago, New Hampshire, and Florida (R. 1131 to 1169). The papers repeated that "these hoodlums should be thrashed until the blood runs down their shoe tops, then put in jail" (R. 476).

The publicity and hostility reached the point that prior to the trial the Executive Secretary of the Oklahoma Press Association in an editorial demanded that the prosecution "proceed with real dispatch to vigorously prosecute to the full length of the law the seven thugs who so brutally kidnapped and violently raped and ravaged" the prosecutrix and demanded the jury to set the punishment for these "animals" at the maximum allowed by law (R. 1126).

The publicity caused such a hostile public reaction that prior to this trial Petitioner was precluded from attending the Public Schools because it was felt that he "would demoralize the rest of the student body."

Editorials and articles portrayed the victim as a "sacrifice on the altar of Justice" and a "modern-day Joan of Arc" (R. 651), while the Petitioner was referred to as

"scum," "dirty rat," "sex maniac," "hoodlum," and "filthy animal."

At the Preliminary Hearing the Petitioner issued subpoenas for twenty-two (22) persons all of whom were served and present in the court. Ten witnesses were endorsed on the Preliminary Information, all of which were under Petitioner's subpoenas. The State called four witnesses and upon the conclusion of the State's case the Examining Magistrate terminated the Preliminary Hearing and refused to allow the Petitioner to call any witnesses he had under subpoena. Petitioner's objections were overruled and he sought a Writ of Prohibition from the Oklahoma Court of Criminal Appeals alleging the District Court had no jurisdiction to hear the case because no valid Preliminary Hearing had been had since the Petitioner had been refused the right to call his witnesses. An order was issued by the Court of Criminal Appeals saying "although Petitioner has raised a grave and serious question this matter is reversible only on appeal."

After being bound over for trial in District Court Petitioner filed his Plea in Abatement, Motion to Quash and Set Aside the Information. These Motions were overruled on October 1, 1965. At Petitioner's arraignment he stood mute and the court entered a plea of "not Guilty."

The prosecuting authorities' multitude of false and prejudicial public statements (see Appendix B) included releasing prior police records of the co-defendants (the Petitioner had no previous criminal record, not even a traffic violation) and accused them of other criminal actions for which no charges were filed.

The County Attorney publicly issued a statement in detail by a co-defendant when he turned State's evidence saying the statement "corroborated the victim's testimony in detail" (R. 533). The County Attorney repeatedly gave out false information as to the results of a medical exam taken within two hours after the alleged attack saying "physician confirms she had been raped," this report was never introduced into evidence (R. 386).

The County Attorney publicly accused the Petitioner's attorneys of "buying off" testimony (R. 595). He repeatedly made comments as to the witnesses' credibility, labeling the State's witnesses as "heroes" and "Christians" while referring to Petitioner's witnesses as "plants," "thugs," and "criminals," and accused Petitioner of hiring investigators to "intimidate and harass" the alleged victim and her parents (R. 522).

The County Attorney publicly indicated that co-defendants would plead guilty (R. 774).

The County Attorney and his agents after receiving the names and addresses of Petitioner's witnesses in San Antonio who would give depositions, arrested twelve of them, took them to the San Antonio Police Station, questioned them and instructed them that if they stated certain facts they would "burn" (R. 2064), thereafter, although all twelve had been subpoenaed only seven showed up at the deposition hearing. At the hearing a police photographer took pictures of all Petitioner's witnesses to add to their harassment (R. 2102). At the conclusion of Petitioner's trial every defense witness including many of their parents were called before a grand jury then in session and accused of taking money for perjured testimony.

The County Attorney admitted filing "secret charges" against Petitioner "just to add to the case" (R. 433) and because he wanted to "mug and fingerprint" the Petitioner.

He also made public request for "red roses" for the victim (R. 654), which the public responded by supplying (see Appendix A for a part of newspaper items caused by prosecuting authorities and Appendix B for groupings of types of statements made).

This case was set for trial in Oklahoma County, November 8, 1965. Thereafter, Petitioner filed Motion for Change of Venue and presented evidence in the nature of affidavits and sworn testimony of three past presidents of the Oklahoma County Bar Association who stated they did not believe the Petitioner could receive a fair trial at that time.

The trial court granted the Change of Venue to Canadian County, which is an adjoining county and with a large part of Oklahoma City lying within the county. Oklahoma City's three TV stations, their radio stations, and newspapers, the predominant news media are received in Canadian County. Canadian County is in the same judicial district as Oklahoma City. In effect the Change of Venue was only hollow formality. Due to the close proximity of the two sites of the trial the Change of Venue amounted to moving to another courtroom in the same court house.

Petitioner moved for continuance or Change of Venue from Canadian County but the trial court overruled the Motion and the trial was begun November 16, 1965.

A special jury panel of 221 persons was summoned to hear the trial of Petitioner. Of the panel, 57 were *voir dired* before a jury was selected. Of these 57, thirty (57%) stated they had a fixed opinion as to Petitioner's guilt and were excused; five (5) others stated they had an impression to his guilt, thus, 35 of the 57 (61%) of those persons *voir dired* stated prejudice.

Of the twelve jurors who rendered the verdict, six (6) worked in Oklahoma City. Thus, 50 per cent of the jurors spent their days in the community that the trial judge had eight days earlier adjudged so prejudiced that the Petitioner could not have received a fair trial and therefore, granted a Change of Venue.

Ten jurors were questioned as to specific prejudicial pre-trial reports that they were exposed to and remembered; all ten stated they had heard or read all or some of the following pre-trial statements:

(1) Prosecuting authority's statement that "the Medical report was a good report for our side of the case and confirms that the victim was raped." (No medical report was ever introduced into evidence.)

(2) That the Defendant's father was a rich and wealthy attorney and would use his influence to "buy his son's way out." (This was untrue.)

(3) Statements by the County Attorney that a co-defendant had voluntarily given a statement which corroborated the victim's testimony in detail and strengthened the State's case. (Evidence proved immunity had been offered and accepted before the statement was given.)

(4) That other co-defendants "were expected to enter a guilty plea."

(5) That the Defendant held a knife to the victim's throat in order to carry out the attack. (No evidence concerning a knife was ever introduced.)

(6) That the Defendant was "tanked up on beer" and that "fights broke out among the rapists as they sought to attack the young girl." (The co-defendant, turned State's evidence said the Defendant had not been drinking that night and did not ever drink.)

The jury included a juror who on *voir dire* stated (R. 1989):

Q. "As I understand it Mr. Davis, you had some opinion and you testified that in all probability it would require putting on some evidence to remove that opinion?

A. Yes sir.

Q. You feel you would have to have evidence to remove that opinion that you have?

A. Yes.

Q. You would require this boy (defendant) to put on some evidence in order to establish his innocence.

A. Yes Sir" (R. 1989).

This same juror later stated "he would have never got a jury, I'd have killed him, that's my story to start with, I'll tell you straight," referring to Petitioner (R. 215 and R. 152).

The Attorney General filed an affidavit of Mr. Davis' attached to his response for Motion for Rehearing in which Mr. Davis admitted the statement and admitting that he was prejudiced *"before"* he heard the evidence (R. 182).

Petitioner raised these errors on appeal but the Appellate Court said the trial court had not erred and overruled the same.

REASONS FOR GRANTING THE WRIT

I.

The Defendant was denied "Due Process" by failure to grant a continuance or change of venue due to the massive, continuing publicity from the alleged crime to the time of the trial.

This Court has long recognized that:

> "The conclusions to be reached in a case will be induced only by evidence and argument in open court and not by any outside influence whether of private talk or of public print,"

Patterson v. *Colorado,* 205 U.S. 454, 462, 51 L.Ed. 879, 881 (1907), and that absent this, court proceedings are meaningless formalities.

The petitioner's case was directly and indirectly discussed in countless prejudicial articles prior to the trial. The publicity continued unabated for five months and included "facts" conclusively showing Petitioner to be guilty. The community was saturated with such a macabre horror of a "factual" accounting of the events of this case that prior to trial any hope of Petitioner's acquittal was lost and any hope for a fair trial was impossible. (See Appendix A and B.)

The sensationalism of the publicity and its effect upon the public can not be doubted. As one local newspaper stated: "the case has set off the greatest deluge of letters

to the editor this paper has known, many of which are of the nature that are not only highly inflammatory and obscene but which does not make them fit for inclusion in the press." The press in the Petitioner's case assumed the role of witness for the prosecution, unsworn, uncross-examined, and un-checked by the rules of evidence and thereby denied the Petitioner due process of law. (See Appendix B.) This Court stated in *Sheppard* v. *Maxwell,* 86 S.Ct. 1507, 16 L.Ed.2d 600 (1966) that when the publicity attendant to the trial of the defendant was of such a nature and extent as to raise even a "reasonable likelihood of prejudice, the proceedings should be continued or transferred to some other county." This Court further stated in *Chapman* v. *U. S.,* 87 S.Ct. 824, 17 L.Ed. 705 that the finding of adverse pre-trial publicity is a *"per se"* reversible error and that no actual showing of prejudice by the jurors is necessary.

After reading of the news article (see Appendix A and B) can it be said that Petitioner was not unquestionably convicted in a community saturated with adverse pre-trial publicity, thus making the proceedings inflicted with a *"per se"* reversible error? The Oklahoma Court of Criminal Appeals reasoned that because the jurors could have given Petitioner 15 years and instead only gave him 5 years that no actual prejudice resulted from the publicity surrounding the case. Such reasoning is in direct conflict with decision of this Court and in effect deprives Petitioner of due process of law.

II.

The Defendant was denied "Due Process" by failure to empanel an impartial jury.

After peremptory challenges were exhausted and after the trial judge had denied challenges for cause and overruled Petitioner's Motion for Continuance, Petitioner was forced to go to trial before a jury which included three (3) persons who had expressed or harbored a fixed opinion as to Petitioner's guilt prior to trial, one of whom stated that Petitioner would have to put on evidence in order to establish his innocence, and before a jury wherein ten (10) jurors had admitted exposure to one or more highly prejudicial and inflammatory items released by the prosecuting authorities. Can it be said that this was a fair and impartial jury or was the Petitioner convicted before the jury heard the case?

What can be more incriminating and prejudicial for a defendant in a rape case than the prosecuting authority prior to trial saying medical reports confirm that the girl was raped, that one co-defendant corroborated the victim's testimony in detail, and that all defendants except the one on trial will plead guilty?

What could be more inflammatory to a juror's mind than a picture of youths tanked up on beer drunken with lust fighting one another to see who would ravage the victim first and placing a knife at her throat to effectuate the attack, and following in the wake reports that a rich and influential father would buy his son's innocence?

These were the "facts" of Petitioner's case *as presented by the press and the prosecuting authorities.* This

was the essence of the articles to which the jurors had been exposed for five months.

It should be pointed out that during the trial no medical reports were introduced, no other co-defendant had entered a plea, no evidence of a knife was introduced, and evidence showed the Petitioner had not been drinking.

No doubt each juror was serious when he said that he could reach a fair verdict in spite of the poison plethora of pre-trial publicity to which he was exposed, but it is not normal human behavior to be unaffected by such reports especially when they continued over a long period of time and emanated from usually truthfully and responsible parties such as the prosecuting authorities.

It is a well established principle that every person accused in criminal proceeding is entitled to a fair trial and a fair tribunal and that this is a basic requirement of due process, *In re Murchison*, 349 U.S. 133, 136, 99 L.Ed. 942, 946. A fair trial and a fair tribunal requires a panel of impartial indifferent jurors and the failure to provide such violates even the minimal standard of due process, *In re Oliver*, 333 U.S. 257, 93 L.Ed. 682. In *Irwin* v. *Dowd*, 366 U.S. 717, 6 L.Ed.2d 751 (1960) this Court stated that merely going through the form of obtaining jurors' assurance of impartiality and indifference is insufficient. That the reviewing court must determine from a review of the entire *voir dire* whether the nature and extent of the publicity caused such a build up of prejudice that exclusions of all preconceptions of guilt from the jury's deliberation would be too difficult and assurance of impartiality impossible. An examination of the *voir dire* will

show that a pattern of deep and bitter prejudice was present throughout the community and with the pervasive pre-trial "factual" cloud of guilt hovering over the Petitioner it would be difficult, if not impossible, to say that the jurors could exclude their preconception of guilt from their deliberations.

We can find no case wherein a juror who had stated that he would require the defendant in a criminal case to put on evidence in order to establish his innocence had been allowed to remain on the jury.

This situation seems unprecedented. Can it be said that a juror who will require the Defendant to put on evidence to prove his innocence does not fatally infect the proceedings?

This alternate juror was sequestered with the remaining jurors for a period of twelve days and it would be blinking reality to not notice the dangers inherent in his association with the other jurors.

III.

The Defendant was denied "Due Process" by the prosecuting authorities' statements and actions which caused the massive publicity to continue unabated until the time of the trial.

The District Attorney and the prosecuting authorities conducted by apparent design a public and malicious issuance of false, misleading, and prejudicial statements with the intended, or undeniable, effect of denying the Petitioner even the possibility of a fair and impartial trial as guaranteed and required by the Constitution of the United States and the State of Oklahoma. The District Attorney

stated that he considered himself exempt from Canon 20. "I do not have to follow that Canon, I owe it to the public to tell them what is going on". (R. 68). (See Appendix B.)

With this unprecedent statement the District Attorney proceeded to place the Petitioner on trial by newspapers and town meeting, committed heinous transgressions of the Canons of Ethic and flagrant violations of all standards of "fundamental fairness." His daily reports to the press were uncalled for and a definite infringement upon the Petitioner's Constitutional rights. It should be noted that once the safeguards of a formal trial had been invoked, much of the purported evidence released to the press by the prosecuting attorney was proven to have been the deceitful fabrication of the prosecuting authorities. It subsequently appeared that the medical report had not corroborated the story of the prosecutrix, but indicated no rape had occurred. That pictures of the prosecutrix did not indicate any rought treatment of her, and that the statement of the witness Ishmael was made not without, but on the express condition of, immunity from prosecution; that the Defendant had steadfastly maintained his innocence, and that the prosecutrix did not allege the purported facts of the attack which had been initially reported by the prosecuting attorney.

The damage to the Defendant had already been done, however. The prosecuting attorney had poisoned the public mind with prejudice and convictions of guilt, and shifted to the Petitioner the burden of proving his innocence.

The collaboration between the District Attorney and the press, the untruthfulness and deceitful fabrication of

"fact" seems unparalleled. In *Bridges* v. *State of California,* 314 U.S. 252, 86 L.Ed. 192 this Court said:

> "Legal trials are not like elections to be won through the use of the meeting hall, the radio and the newspaper."

The Courts realize that such conduct and statements are especially prejudicial to the Defendant because the prejudicial effect of such material "may indeed be greater than when it is part of the prosecution's evidence for it is then not tempered by protective procedures." *Marshall* v. *U. S.,* 360 U.S. 310, 79 S.Ct. 1171 (1959).

In *Sheppard* v. *Maxwell,* 86 S.Ct. 1507, 16 L.Ed.2d 600 (1966), this Court urged that disciplinary measures should be taken against counsel who collaborates with the press:

> "Collaboration between counsel with the press as to informations affecting the fairness of a criminal trial is not only subject to regulation but is highly censorable and worthy of disciplinary measure."

The actions of the District Attorney in this case are the most flagrant and oppressive conceivable (see Appendix A and B). This is the type of collaboration between counsel and press that the Supreme Court had in mind when it handed down the *Sheppard* v. *Maxwell, supra,* decision, and that the "disciplinary measures" mentioned in that decision should be further succinctly set forth.

Examination of the record will not disclose a single instance in which the Petitioner or his Counsel contributed to the vast expanse of pre-trial publicity. An examination of the source of the publicity will reveal that the offending parties were the prosecuting authorities. It would be a

transgression upon fundamental fairness for the prosecuting authorities to be allowed to use the press to emanate to the public untruths and highly excitable and irrelevant matter which only served to excite and arouse the public against the Petitioner causing them to clamor for conviction without hope for parole or pardon. A conviction so secured constitutes a denial of due process of law in its rudimentary conception.

Petitioner realized that this Court is importuned to review many cases where unfair and inflamed newspaper accounts have allegedly denied the Defendant "due process," however in this case the total disregard of fundamental fairness by the prosecutor is so flagrant that its prejudicial effect upon the jury is not speculation but a demonstrable reality.

IV.

The Defendant was denied "Due Process" by the refusal of the examining magistrate to allow the Petitioner at his preliminary hearing to call material witnesses in his own behalf that he had subpoenaed and who were present in the court because the preliminary hearing is a critical stage of the criminal proceedings under Oklahoma Law.

Title 22 O.S.A., Section 259 states:

> "When the examination of the witnesses on the part of the State is closed, *any witness the defendant produces must be sworn and examined.*" (Emphasis supplied.)

The Oklahoma Constitution, Article 2, Section 17 states:

> "No person shall be prosecuted for a felony by information without having had a preliminary ex-

amination before an Examining Magistrate, or having waived such Preliminary examination."

Under Oklahoma Law at the Preliminary Hearing:

(1) The Defendant has the right to demonstrate that he should not be held for trial and *at no other time* and place can this be demonstrated.

(2) The Defendant had the right to call witnesses and examine them in his behalf and at no other time can this be done.

(3) The Defendant is entitled to call the witnesses ostensibly for the State, present under subpoena by the Defendant and listed on the Preliminary Information, and at no other time can this be done.

(4) The Defendant has a right to preserve the testimony of a witness who might later be unavailable and at no other time can this be done.

(5) Defendant has a right of discovery at the Preliminary Hearing and at no other time can this be done. Depositions of in-State witnesses are not permitted.

The refusal of the Examining Magistrate to let the Defendant call twenty-two (22) witnesses which he had subpoenaed, ten (10) of whom were listed as material State witnesses and endorsed on the Preliminary Information, is in direct violation of the Oklahoma State Statutes and the State Constitution and violates the rights of the Defendant to "due process" under the Fourteenth Amendment to the United States Constitution, for in effect he had no preliminary examination.

Among the witnesses the Petitioner was refused to have testify were, the Doctor who examined the complaining witness two hours after the alleged rape, another Doctor who also examined her, a day and a half after the alleged rape and gave his reports to the prosecutor. Also the Petitioner was not allowed to call the custodians of records at the hospital where the prosecutrix was examined, plus sixteen (16) other defense witnesses, including the police officers who investigated the alleged crime.

The Petitioner was permitted to call only two witnesses of the ten witnesses endorsed on the Preliminary Information.

The Court of Criminal Appeals in its opinion stated:

"I feel that the statute should be complied with, or repealed.

"The Legislature does not enact statutes to be warped or twisted and interpreted to suit the converse of a particular situation. . . . However, this does not mean that only the state can put on witnesses and the magistrate allowed to call a halt to the proceeding under the auspices that he has been satisfied with the evidence. . . .

"The defendant certainly has a right to produce evidence material to the two issues as stated above. The materiality of evidence as to these two issues is broad in scope and the Magistrate should restrict the testimony with caution, or else defendant may be denied the right of being properly confronted with his accusers. . . .

"This matter has previously been discussed in conference and it is the consensus of this court's opinion that this decision is not to restrict the de-

fendant in his right under the law as it pertains to preliminary hearing, but does fortify the magistrate in his right to restrict it to those witnesses who possess information relative or material to the issues" (R. 123).

Thus, the court says that this was the law before this case, but we are not going to follow it in this case, but you are notified that this still is the law in future cases.

This refusal to follow the law is a deprival of the Defendant's right to "due process" since he in actual fact had no real preliminary examination.

Under Oklahoma Law the Preliminary Hearing is a critical stage of the proceedings and the Defendant's rights to be confronted by his witnesses and the halting of the Hearing without permitting Defendant to call doctors who had examined the prosecutrix and police officers who had made investigations and who were material witnesses was and is a deprival of due process, *Hamilton* v. *Alabama,* 368 U.S. 52; *Pointer* v. *Texas,* 380 U.S. 400; *Malloy* v. *Hogan,* 378 U.S. 10.

CONCLUSION

For the foregoing reasons, this Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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